Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 88-389

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR APPELLANT

ANTHONY J. CELEBREZZE, JR.
Attorney General

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Of Counsel:

Attorneys for Appellant

WILLIAM R. DAMSEL
State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

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REPLY BRIEF FOR APPELLANT

In its opening brief, appellant Public Employees Retirement System of Ohio ("PERS") demonstrated that its retirement plan, which limits eligibility to apply for disability retirement benefits to persons under the age of sixty who are not receiving another retirement benefit from the State of Ohio, is exempt from the proscriptions of the Age Discrimination in Employment Act ("ADEA" or "Act") by virtue of Section 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2) ("Section 4(f)(2)"). PERS explained that the plain, unambiguous language of Section 4(f)(2) protects all ongoing administrative programs for the provision of non-wage compensation that were not conceived specifically to discriminate on the basis of age in regard to those terms and conditions of employment and types of compensation not conferred through employee benefit plans. PERS then demonstrated that its plan is entitled to the coverage of Section 4(f)(2) because it is ongoing; it provides retirement, not wage-based, benefits; and any age-based variations in those retirement benefits are designed to ensure that the largest possible number of persons receive retirement benefits. PERS demonstrated further that its retirement plan is not designed to force any person from the work force, or to vary any person's wages or terms and

conditions of employment.

The briefs submitted by appellee ("Betts") and the Equal Employment Opportunity Commission ("EEOC") are noteworthy for the lack of attention devoted to the plain, unambiguous language of Section 4(f)(2). Ignored is the fact that Section 4(f)(2) extends its protection to "any" bona fide employee benefit plan, which indicates that Congress intended the exemption's coverage to be comprehensive. *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980) (the term "any" is an example of expansive, not limiting, language). Similarly ignored is the fact that the phrase "employee benefit plan" has a well-established meaning in both the law and industrial relations practice, a meaning that is irreconcilable with the age-related cost justification standard promoted by Betts and the EEOC. Indeed, it is revealing that even the lower courts that have subscribed to the conclusion advanced by Betts and the EEOC have been unable to agree on the language in Section 4(f)(2) that provides the statutory rationale for the age-related cost justification.

Because a straightforward reading of Section 4(f)(2) is inconsistent with their age-related cost justification theory, Betts and the EEOC urge the Court to endorse what they characterize as a "contemporaneous and consistent" administrative interpretation of the exemption. *See NLRB v. United Food & Commercial Workers Union*, ___ U.S. ___, 108 S. Ct. 413, 421 n. 20 (1987) (consistency of agency regulation and "whether interpretation is contemporaneous with enactment of . . . statute" are important considerations in evaluating weight to be afforded agency interpretation). A brief review of the evolution of the regulations referring to Section 4(f)(2) reveals, however, that the administrative interpretation is anything but contemporaneous or consistent.

The first regulations concerning the scope of Section 4(f)(2) were promulgated by the Department of Labor ("DOL") on

January 9, 1969,[1] *see* 34 Fed. Reg. 322-23 (1969), more than a year after the passage of the ADEA. 29 C.F.R. § 860.120 stated:

> Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *". Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purpose of the Act. A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

While this regulation offered a "safe-harbor" to those employers who could demonstrate that distinctions in benefits provided to older and younger workers were based on age-related cost considerations, it cannot be construed to permit *only* those benefit variances justified by age-related

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[1] Regulations pertaining to the ADEA initially were published on June 21, 1968. They did not, however, make any reference to Section 4(f)(2). *See* 33 Fed. Reg. 9172-73 (1968).

cost data.

Neither Betts nor the EEOC point to this regulation as having established an age-related cost justification limitation. Instead, they rely on regulations issued on June 21, 1969, as the basis for their claim that the administrative agencies charged with enforcing the ADEA consistently have interpreted Section 4(f)(2) as allowing only those benefit variances justified by age-related cost considerations. *See* 34 Fed. Reg. 9708-09 (1969). These regulations, however, simply added another "safe-harbor":

> Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

To be sure, the following paragraph, entitled "Profit-sharing plans," purported to limit the application of Section 4(f)(2):

> Not all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision and a profit-sharing plan as such would not appear to be within its terms.

But, the following passage makes it clear that this limitation was not designed to constrict the boundaries of the Section 4(f)(2) exemption:

> However, *where it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The "bona fides" of such plans will be considered on the basis of all the particular facts and circumstances.*

(Emphasis added.) In short, in 1969, DOL regulations acknowledged that Section 4(f)(2) could apply to plans that predicated age-based distinctions in benefits on factors other

than age-related cost considerations.

It was not until 1979 that the age-related cost considerations mentioned in § 860.120 graduated from a safe harbor to the exclusive means for satisfying the terms of Section 4(f)(2). In 1979, DOL promulgated detailed regulations to implement the 1978 amendments to the ADEA, including the Act's new prohibition in Section 4(f)(2) on involuntary retirement. These new regulations provided the opportunity for DOL to state, for the first time, that any benefit variance without age-related cost justification would be characterized as a "subterfuge." *See* 44 Fed. Reg. 30,648, 30,658 (1979). The argument offered by Betts and the EEOC that DOL took this position contemporaneously with the enactment of the ADEA is inconsistent with this regulatory history.

Even if the various versions of 29 C.F.R. § 860.120 reflect the consistency that Betts and the EEOC attribute to them, the age-related cost considerations limitation must be rejected because it is at odds with congressional intent. *See United Food & Commercial Workers Union*, 108 S. Ct. at 421 (agency interpretation must be consistent with legislative intent); *accord, INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-50 (1987). As explained in PERS' opening brief, at 25-29, the language of Section 4(f)(2) indicates that Congress intended to exempt from the ADEA any plan that provides employees with benefits unrelated to salary or wages, so long as the plan is not designed to frustrate the employment of older workers.[2] Further, the legislative history confirms that

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[2] The age-related cost justification cannot be derived from the "such as retirement, pension, or insurance plan" language of the statute. For example, age-related cost is not the "common thread" connecting those types of plans. Profit-sharing retirement plans, retirement incentive plans, and defined-contribution retirement plans vary benefits in ways that frequently, if not always, are without age-related cost justifications. The age-related cost justification theory also cannot be derived from the "subterfuge" language of the exemption. A subterfuge refers to a specific intent to evade a statutory requirement, which requires a subjective inquiry. In contrast, the age-related cost justification theory depends exclusively on a particular kind of empirical proof, which requires an objective inquiry that is not statutorily mandated.

Congress, for a variety of reasons, elected to promulgate a broad exemption from the ADEA for employee benefit plans, with the understanding that the problems of age discrimination in employee benefit plans would be addressed comprehensively in subsequent legislation. *See* discussion in PERS' opening brief, at 30-39. The age-related cost considerations theory simply is irreconcilable with the legislative compromise embodied in the language and legislative history of Section 4(f)(2).

It is true that the 1967 legislative history of Section 4(f)(2) indicates that some proponents of the exemption were concerned with age-related cost considerations. As Betts and the EEOC now apparently are willing to concede, however, even one of Section 4(f)(2)'s principal sponsors, Senator Javits, envisioned that Section 4(f)(2) would do more than just protect benefit plans that differentiated on the basis of age when justified by age-related cost considerations.[3] *See* EEOC's brief, at 18 and n. 11. (Senator Javits was concerned with preventing the disruption of existing benefit plan requirements). *See also* Betts' brief, at 9-10. But, as the Court has noted,

> even if these were the only available indications of congressional intent apart from the language which Congress enacted, we would have grave doubts that they were sufficient to overcome what seems to us to be the clear, generic meaning of . . . word[s]. . . . Oral testimony of witnesses and individual Congressmen, unless very precisely

[3] Contrary to the EEOC's assertion, *see* EEOC's brief at, 16, 18-19 n. 11, nothing in the 1967 legislative history indicates that Senator Javits aligned himself with Senator Smathers, or that he sought to accommodate Senator Smathers' perspective in his amended version of Section 4(f)(2). Indeed, Senator Javits announced his intention to offer an amendment to Section 4(f)(2) *before* Senator Smathers suggested that age-related costs be incorporated into the ADEA. *See Age Discrimination in Employment: Hearing on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. 27, 28 (March 14, 1967).

> directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself. To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President.

Regan v. Wald, 468 U.S. 222, 237 (1984). *See also Pittston Coal Group v. Sebben*, ____ U.S. ____, 109 S. Ct. 414, 420-21 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history, and the text of the present statute plainly embraces criteria of more general application.").[4]

Two other factors militate against deferring to the DOL/EEOC interpretation of Section 4(f)(2). First, DOL did not participate in drafting the version of Section 4(f)(2) enacted by Congress. *Cf. Miller v. Youakim*, 440 U.S. 125, 144 (1979) (agency interpretation assumes additional significance when agency's suggestions are incorporated in legislation). As noted in PERS' opening brief, at 30-39, the version of Section 4(f)(2) offered by the Secretary of Labor was considered too restrictive by Congress.

Second, the administrative regulations in question are "interpretative," not substantive. Consequently, courts need not "give effect" to them. *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977). In fact, the Fifth Circuit twice has applied Section 4(f)(2) to employee benefit plans that denied benefits

[4] Betts and the EEOC further err in their reliance on 1978 legislative history to the ADEA for the purpose of explaining the scope of Section 4(f)(2) as originally enacted in 1967. "Since such statements cannot possibly have informed the vote of the legislators who earlier enacted the law, there is no more basis for considering them than there is to conduct post enactment polls of the original legislators." *Pittston Coal*, 109 S. Ct. at 422.

to older workers despite the fact that those plans did not reflect age-related cost considerations. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215-17 (5th Cir. 1974) (profit-sharing retirement plan); *Alford v. City of Lubbock*, 664 F.2d 1263, 1265 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (defined contribution pension plan). In addition, other circuits have refused to apply the age-related cost considerations theory to employee benefit plans that predate the passage of the ADEA. *See EEOC v. County of Orange*, 837 F.2d 420 (9th Cir. 1988); *EEOC v. Cargill, Inc.*, 855 F.2d 682 (10th Cir. 1988).

Principal among the EEOC's arguments in favor of deferring to its interpretation of Section 4(f)(2) is the contention that PERS' interpretation will open a "Pandora's box" of age discrimination infecting every aspect of employment. The EEOC's claim is nothing more than hyperbole. Rejection of the age-related cost limitation will not authorize employers to discriminate on the basis of age in any term or condition of employment or in compensation not conferred through an employee benefit plan. Moreover, discrimination intended to circumvent the purpose of the ADEA - enhancing the employment opportunities of older workers - will, as is the case now, not be countenanced.

Rejection of the age-related cost limitation *will*, however, give effect to the language of Section 4(f)(2). It will also permit Section 4(f)(2) to serve its purpose of preventing the disruption of myriad public[5] and private[6] employee benefit plans, plans

[5] As noted in the brief amicus curiae submitted on behalf of PERS by the Commonwealth of Pennsylvania and several other states, "at least ten states [in addition to Ohio] restrict disability retirement benefits to those" persons who become disabled prior to eligibility for age and service retirement. *See* Pennsylvania's brief, at 29-30. "Twenty-five states include other express age-related distinctions in establishing eligibility requirements for disability retirement benefits." *See id.*, at 30-31.

[6] According to the brief amicus curiae submitted on behalf of PERS by the Association of Private Pension and Welfare Plans ("APPWP"), "the majority of retirement plans . . . apparently limit eligibility for disability benefits to those (younger) employees who are ineligible for regular or early retirement benefits." *See* APPWP's brief, at 24. (Citation omitted.)

that were created in good faith and that cannot satisfy the arbitrary age-related cost considerations requirement that the Sixth Circuit and the EEOC seek to impose. Tha. avoidance of such disruption might generate effects that are unattractive to the EEOC is a problem that must be directed to the attention of Congress, not to this Court. *See Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, ___ U.S. ___, 108 S. Ct. 830, 837 (1988) (policy arguments should be addressed to Congress).[7]

Both Betts and the EEOC recognize that even if this Court adopts the "age-related cost considerations" theory, reversal still would be required unless (1) the interpretation of the "subterfuge" clause, as discussed in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), is repudiated, or (2) PERS is not found to be a preexisting plan. *See EEOC v. County of Orange*, 837 F.2d 420 (9th Cir. 1988). PERS discussed at length in its original brief why *McMann* is still good law in respect to its conclusion that employee benefit plans that predate the passage of the ADEA in 1967 are exempt from the coverage of the Act.[8] *See* PERS' opening brief, at 16-23. Betts and the EEOC argue, however, that comments in the legislative history of the 1978 amendments to Section 4(f)(2) are enough to overrule the Court's reasoning in *McMann*, as well as the holding in that case. Betts places heavy reliance on two of the Court's decisions, *Newport News*

[7] Since 1967, Congress has not hesitated to amend the ADEA to address particular problems of age discrimination in employee benefit plans. For example, in 1978, the prohibition against involuntary retirement was added. In 1982, Congress required employers with 20 or more employees to offer the same group health plan benefits to employees age 65 and older as are offered to employees under age 65. 29 U.S.C. § 623(g). Finally, in 1986, Congress required employers to continue to accrue pension benefits for employees who continue to work beyond their normal retirement date. 29 U.S.C. §623(i).

[8] Even if a preexisting plan can be a subterfuge, there "is no support in the legislative history for the interpretation of that language as requiring 'some economic or business purpose.'" *McMann*, 434 U.S. at 207 (White, J., concurring). (Citation omitted.)

Shipbuilding & Dry Dock v. EEOC, 462 U.S. 669 (1983), and *Western Airlines v. Criswell*, 472 U.S. 400 (1985). Neither of these cases, however, lends support to the proposition that legislative history, in the absence of corrective legislation, is enough to supplant a standing judicial interpretation of law.

In *Newport News*, the Court was called on to interpret the Pregnancy Discrimination Act of 1978, which amended Title VII of the Civil Rights Act of 1964. The Pregnancy Discrimination Act was Congress' response to the decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which this Court determined that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." 429 U.S. at 125.

Examining the *language* of the Pregnancy Discrimination Act, the Court concluded that

> [w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision. . . . *The first clause of the [Pregnancy Discrimination] Act states, quite simply:* "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical condition."

Newport News, 462 U.S. at 678. (Emphasis added.) The Court reiterated its reliance on the language of the amending legislation in a subsequent portion of its decision: "*[t]he 1978 Act makes clear* that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." 462 U.S. at 684. (Emphasis added.) Although the Court found in the legislative history additional support for its position, it acknowledged Congress' recognition "that *amending legislation was necessary* to reestablish the principles of Title VII law as they had been understood prior

to the *Gilbert* decision." *Id.* at 679.[9] (Emphasis added.)

The decision in *Criswell* also is of no assistance to Betts. In *Criswell*, congressional inaction was relied on by the Court as one of several reasons for adopting a longstanding lower court interpretation of legislation. That is far different than relying exclusively on legislative history to *overturn* a standing Supreme Court interpretation of a statute. If Betts is correct that the legislative history of a Congress convened ten years after passage of legislation is sufficient to overrule judicial interpretations of that legislation, then it necessarily follows that Congress was not required in 1978 to add to Section 4(f)(2) the language prohibiting involuntary retirement. All of *McMann*, including its holding, could have been swept away simply by amending Section 4(f)(2) in some insignificant fashion, such as substituting the word "chapter" for "Act" in the subterfuge clause of Section 4(f)(2), provided, of course, that disparaging comments about the *McMann* decision were made during the course of congressional debate over the amendment. This clearly is not the law.

Betts and the EEOC next argue that this Court can avoid disturbing *McMann* because PERS' status as a preexisting plan was forfeited when it was amended in 1976 to provide a minimum benefit for disability retirants, but not for age and service retirants. *See* EEOC's brief, at 25-26 and note 16. This argument ignores the fact that the provision challenged by Betts and struck down by the Sixth Circuit - the prohibition against persons age sixty or older applying for disability retirement benefits - was instituted in 1933.[10] The 1976 amendment of PERS did *not* discriminate between

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[9] The circumstances of *Newport News* offer another crucial distinction in comparison to the case at bar: the legislative history scrutinized by the Court in *Newport News* was created by the Congress that *enacted* the Pregnancy Discrimination Act; the Court did not rely on the legislative history of one Congress to explain the meaning of a statute enacted ten years earlier by a different Congress.

[10] The age 60 requirement was not contained in the version of Ohio law in effect from 1957-1959.

older and younger workers. Rather, it differentiated between the disabled and non-disabled. Thus, the 1976 amendment to PERS did not affect PERS' status as a preexisting plan.

Even if PERS' plan is not a preexisting plan, PERS still has carried its burden of demonstrating that its plan is entitled to the coverage of Section 4(f)(2): PERS is bona fide, i.e., it exists and pays substantial benefits; it is, by definition, an "employee benefit plan such as a retirement, pension, or insurance plan;" and it is not a "subterfuge to evade the purposes of the Act" - disability retirement benefits are not designed to frustrate the employment of older workers, but instead exist to provide benefits to persons who, at the time they become disabled, would otherwise be ineligible for age and service retirement. Finally, PERS has no authority to permit or require the involuntary retirement of any individual because of age.[11]

For the foregoing reasons and those set forth in PERS' opening brief, the judgment of the court of appeals should be reversed and the case remanded to that court for further proceedings not inconsistent with this Court's opinion.

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[11] As both PERS, *see* PERS' opening brief, at 10 n. 9, and the EEOC, *see* EEOC's brief, at 3 n. 3, have noted, the Sixth Circuit did not address the district court's conclusion that Betts' ineligibility for disability retirement benefits resulted in her involuntary retirement. The Sixth Circuit should be directed to address this conclusion on remand. The district court's conclusion is, in any event, absurd. Betts was *attempting* to retire. The only source of contention between the parties was the type of benefits for which she could apply. The fact that she was ineligible for one type of retirement benefit because of her age can in no way detract from the facts that Betts' retirement was motivated by her health and that PERS had no statutory authority, and did not attempt, to involuntarily retire her because of her age.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General

ANDREW I. SUTTER
Assistant Attorney General
Counsel of Record
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 644-5003

NANCY J. MILLER
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0410
(614) 466-5026

Attorneys for Appellant

Of Counsel:

WILLIAM R. DAMSEL
State Office Tower
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
(614) 466-2872

February, 1989

Title 29 - LABOR

Chapter V - Wage and Hour Division,
Department of Labor

SUBCHAPTER C - AGE DISCRIMINATION IN EMPLOYMENT

PART 860 - INTERPRETATIONS

Miscellaneous Amendments

(34 Fed. Reg. 322-23 (January 9, 1969))

Pursuant to the Age Discrimination in Employment Act of 1967 (81 Stat. 602; 29 U.S.C. 620) and Secretary's Orders No. 10-68 (33 F.R. 9729) and No. 11-68 (33 F.R. 9690), 29 CFR Part 860 is hereby amended by revising § 860.110, and by adding new §§ 860.20, 860.75, 860.104, 860.106, and 860.120 to read as set forth below.

* * *

6. The new § 860.120 reads as follows:

§ 860.120 Costs and benefits under employee benefit plans.

Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *". Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purpose of the Act. A retirement, pension or insurance plan

will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

* * *

Title 29 - LABOR

Chapter V - Wage and Hour Division, Department of Labor

SUBCHAPTER C - AGE DISCRIMINATION IN EMPLOYMENT

PART 860 - INTERPRETATIONS

Miscellaneous Amendments

(34 Fed. Reg. 9708-09 (June 21, 1969))

Pursuant to the Age Discrimination in Employment Act of 1967 (81 Stat. 602; 29 U.S.C. 620) and Secretary's Orders No. 10-68 (33 F.R. 9729) and No. 11-68 (33 F.R. 9690), 29 CFR Part 860 is amended as set forth below.

As these are interpretive rules and are not substantive, the provisions of 5 U.S.C. 553 concerning notice of proposed rule making, public participation therein, and delay in effective date do not apply. I do not believe such procedure and delay will serve a useful purpose here. Accordingly, these rules shall be effective immediately.

* * *

6. Section 860.120 is revised to read as follows:

§ 860.120 Costs and benefits under employee benefit plans.

(a) Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization

"to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

(b) Profit-sharing plans: Not all employee benefit plans but only those similar to the kind enumerated in section 4(f)(2) of the Act come within this provision and a profit-sharing plan as such would not appear to be within its terms. However, where it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The "bona fides" of such plans will be considered on the basis of all the particular facts and circumstances.

* * *